Supreme Court, U.S.
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No. 87-5002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELLIS T. MCCOY, ETC.,
Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

On Appeal From The Supreme Court Of Wisconsin

REPLY BRIEF FOR THE APPELLANT

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ARGUMENT

I. APPELLEE'S ARGUMENT THAT APPOINTED APPELLATE COUNSEL HAS PERFORMED AS AN ADVOCATE WHEN COUNSEL CONCLUDES THAT THE APPEAL IS FRIVOLOUS AND THEN PROVIDES THE COURT WITH REASONS SUPPORTING THAT CONCLUSION ERRONEOUSLY DISTORTS THE ADVERSARIAL TESTING PROCESS.

Appellee erroneously concludes that the appellant's position that the discussion requirement is unconstitutional is contrary to a prior *concurring* opinion of this court. Appellee's brief at p. 9, *citing Polk County* v. *Dodson*, 454 U.S. 312, 327 (1981) *(Burger, C.J. concurring)*. Appellant has no dispute with the decision rendered by the court in *Dodson* or the proposition stated that "it is the obligation of any lawyer . . . not to clog the courts with frivolous motions or appeals." *Id.* at 323. That is precisely why this court created the procedure in *Anders* v. *California*, 386 U.S. 738 (1967), allowing counsel to move to withdraw after notifying the court that the case is frivolous. This court created a way of protecting an appeal as a matter of right while notifying the court that the appeal was frivolous. *Dodson* and *Anders* are in no way inconsistent.

Appellee apparently recognizes that the role of an "advocate" and an "adviser" are different, yet would saddle the appellant with an adviser in that appeal instead of an advocate. *See* Appellee's brief at pp. 9-15. Under appellee's approach, the lawyer should, after concluding that the appeal is frivolous, provide the court with an explanation justifying that conclusion. Appellee's brief at p. 13. That is consistent with an attorney's role as an adviser as provided in Wisconsin S.C.R. 20.34(1)(c) with one major exception. Under S.C.R. 20.34(1)(c), the lawyer should give his or her professional opinion to the

client, not the court. The role of partisan advocacy is not being fulfilled by definition when the attorney is acting as an adviser to the court.

Appellee has missed the most important facet of providing appellate representation in attempting to justify the Wisconsin discussion requirement. In stating that the attorney has reached the limits of permissible advocacy once he concludes after conscientious investigation that the appeal is frivolous,[1] appellee has ignored the fact that the appellant would not have an advocate where he needs it most, in the court of appeals. A leading article on no merit reports in Wisconsin recognizes that under the Wisconsin procedure, once counsel determined that there were no issues of arguable merit, counsel woul l "change hats and become and *amicus curiae*." H.B. Eisenberg, *No Merit Briefs in Wisconsin Supreme Court*, 45 Wis. Bar Bull. No. 2, 28, at p. 29 (April 1972). By adhering to the discussion requirement, appellate counsel would be depriving the client of partisan advocacy in the appeal before the court of appeals. The appeal would become all but meaningless, although the lawyer would have the satisfaction of knowing that he or she fulfilled the ethical obligation of acting as an adviser.

Appellee suggests that under Wisconsin's discussion requirement, appellate counsel would be providing the court with something other than the type of detached evaluation done by an *amicus curiae*. That suggestion states a distinction without a difference. Appellate counsel provides the court with an evaluation of the case inconsistent with the client's interests under the Wisconsin rule. Indeed, as appellee suggests, the assumption is that appellate counsel has resolved all doubts in favor of the

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[1] Appellee's brief at pp. 12-13.

client before reaching a conclusion of frivolousness, so that any reasons provided by the appellate lawyer would carry more weight than those provided by opposing counsel. In other words, the client is put in a position far more damaging to his or her interests than the client would be in if the other party were required to file its own brief. The Wisconsin discussion requirement is therefore contrary to *Anders*, as it requires the attorney to advance positions contrary to the interests of the client in order to arguably assist the court. Moreover, the discussion requirement does not even assist the court, contrary to appellee's assertions. *See* Appellee's brief at pp. 21-28.

II. THE DISCUSSION REQUIREMENT DOES NOT ASSIST THE COURT IN DECIDING WHETHER THE APPEAL IS FRIVOLOUS, BUT INSTEAD RELIEVES THE ATTORNEY GENERAL'S OFFICE OF ITS RESPONSIBILITY TO ACT AS AN ADVOCATE ON BEHALF OF THE STATE OF WISCONSIN.

The Wisconsin Supreme Court in the instant action concluded that the discussion requirement would better equip the court to make a correct decision about the potential merits of the appeal because it would have before it not only the authorities which might favor an appeal, but also the authorities which might militate against it. *State ex rel. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 100-101, 403 N.W.2d 449 (1987). This is no doubt true, as this court noted in *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) ["truth . . . is best discovered by powerful statements on both sides of the question."] Nevertheless, this court has not before required both sides of the question to be presented by only one party to an action.

The reality is that the Wisconsin appellate courts do not receive any additional assistance by the discussion

requirement that they would have in any other appeal as a matter of right. In both regular appeals and no merit appeals, the appellate courts must make an independent evaluation of each case on the merits after receiving briefs pointing out both sides of any possible meritorious claims. Therefore, the court does not "operate in a more efficient, expeditious and cost-saving manner." *McCoy*, 137 Wis. 2d at 103.

Similarly, the appointed appellate counsel does not operate in a more efficient, expeditious and cost-saving manner by adhering to the discussion requirement. In both regular appeals and no merit appeals, the attorney must identify possible issues, research the facts and the law, evaluate the merits of the appeal, provide the client with that evaluation, and then brief the appeal on the merits on behalf of the client. Indeed, appointed appellate counsel under the Wisconsin rule must do more work under the no-merit procedure, as counsel must now provide the court with the research and evaluation normally provided by opposing counsel.

Instead, the only agency that benefits from the discussion requirement in Wisconsin is the attorney for the State of Wisconsin, as that attorney no longer has to file the brief on behalf of the State that it would normally file. In many of the appeals in this state, including the appeal on behalf of Mr. McCoy, the attorney for the State is the Department of Justice under the direction of the Wisconsin Attorney General.[2] In other words, the Wisconsin

[2] WISCONSIN STATUTES

165.25 Duties of department of justice. The department of justice shall:

(1) REPRESENT EACH STATE. Except as provided in s. 59.47(7), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official employe or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The radioactive waste review board may request under s. 16.08(7) that the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455(1)(d).

59.47 District attorney; duties. The district attorney shall:

. . . .

(7) Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court. The district attorney of the county in which the case was filed shall represent the state in any appeal or other proceeding regarding that case which is decided by a single court of appeals judge, as specified in s. 752.31(3).

Attorney General's Office and the District Attorney's Office are the only agencies that stand to benefit from the discussion requirement. Thus, the underlying rationale for the Wisconsin Supreme Court's decision is invalid, if the State of Wisconsin is required to file its own brief.

Obviously, an attorney cannot act as an active partisan advocate for opposing parties in a pending legal action. To do so would create a glaring conflict of interest. Yet that is precisely what appellee would have appointed counsel do in an appeal. An appellate attorney does not represent the State of Wisconsin in a criminal appeal, and should not be required to do the state's job for it. Since it is true that an appellate court would be best served when it is presented by both sides of the appeal, the most practical approach would be to have appointed appellate counsel serve the

opposing counsel representing the State (as was done in the underlying appeal in this case), and then require opposing counsel to provide the court with reasons why the case lacks merit if the court cannot easily determine why the appeal is frivolous.

Appellant would note that appellee apparently concedes that Wisconsin's no merit procedure fails to subject the appeal to the adversarial process. Appellee's brief at p. 27. That being the case, an appellant whose case is decided under that procedure has less than nominal representation for the appeal, as well as something less than a full appeal on the merits. No attorney should have the duty of providing his or her client with less than that provided for as a matter of right.

III. THE DISCUSSION REQUIREMENT DOES NOT HELP ASSURE THAT THE ATTORNEY IS PROVIDING HIS OR HER CLIENT WITH EFFECTIVE REPRESENTATION.

Appellee suggests that the discussion requirement assures the court that counsel has discharged his obligation to his client in a competent and professional manner. Appellee's brief at pp. 18-20. This is simply not the case.

Counsel in an *Anders* situation establishes that he or she has competently and professionally represented the client by identifying all possible issues that might possibly support the appeal, by providing the court with all relevant facts and legal authority concerning those issues, and then by moving to withdraw on the grounds that the issues are frivolous. If the appellate court, after reviewing the *Anders* brief, can't come to the conclusion that the case is frivolous, then counsel may have been wrong in reaching the conclusion that the case is frivolous. The court can then, having issues already identified, require

opposing counsel to brief the other side, without having appointed counsel performing that function. On the other hand, if the frivolousness of the case is obvious after a review of the no merit brief, then the court can allow counsel to withdraw without further briefing. Under either scenario, the court will have enough information to determine that counsel has discharged his or her obligation in a competent manner, while at the same time protecting the adversarial testing process on appeal.

The Wisconsin Supreme Court Rules provide that ". . . the function of an advocate is to advance or argue the cause of another . . . ." S.C.R. 20.23(2)(h)(1986).[3] The rules further provide that "(n)either his nor her personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute a lawyer's loyalty to a client." S.C.R. 20.23(1) (1986).[4] And finally, the rules provide that while a criminal defense lawyer has

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[3] S.C.R. 20.23(2) (1986). . .

(h) Occasionally a lawyer is called upon to decide in a particular case whether he or she will be a witness or an advocate. If a lawyer is both counsel and witness, he or she becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

[4] S.C.R. 20.23 (1986) **A lawyer should exercise independent professional judgment on behalf of a client.** (1) ETHICAL CONSIDERATION. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither his or(sic) her personal interest, the interests of other clients, nor the desires of 3rd persons should be permitted to dilute a lawyer's loyalty to a client.

a duty to advise the client as to the prospects of success on appeal, it is for the client to decide whether an appeal should be taken. S.C.R. 20.34(2)(d) (1986).[5]

Appellate counsel in this case had attempted to provide the client with an appeal on the merits, notwithstanding the fact that counsel has moved to withdraw because the appeal is frivolous. Counsel has faithfully followed the procedures outlined in *Anders* and protected the adversary testing process on behalf of the client. As appellee concedes that the purpose of the Wisconsin no merit procedure is to take frivolous appeals out of the adversarial system,[6] then that procedure interferes with appellant's right to appeal, to due process on appeal and to effective assistance of counsel. Accordingly, this Court should reject the Wisconsin discussion requirement because it violates the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court reverse the Wisconsin Supreme

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[5] S.C.F. 20.34(2) (1986)

(d) In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his or her own. But otherwise the authority to make decisions is exclusively that of the client and if made within the framework of the law, such decisions are binding on his or her lawyer. As typical examples in civil cases, it is for the client to decide whether he or she will accept a settlement offer or whether he or she will waive his or her right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his or her client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

[6] Appellee's brief at pp. 27-28.

Court and hold that Wis. Rule § 809.32(1) is unconstitutional, and remand the matter with directions to prohibit the Wisconsin Court of Appeals, District I, from striking the brief filed on behalf of Mr. McCoy in his appeal and from requiring counsel to inform the court why the issues lack merit.

Respectfully submitted,

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